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HOW TO BE A LOYAL CITIZEN WHEN GOVERNMENT IS SUBVERSIVE

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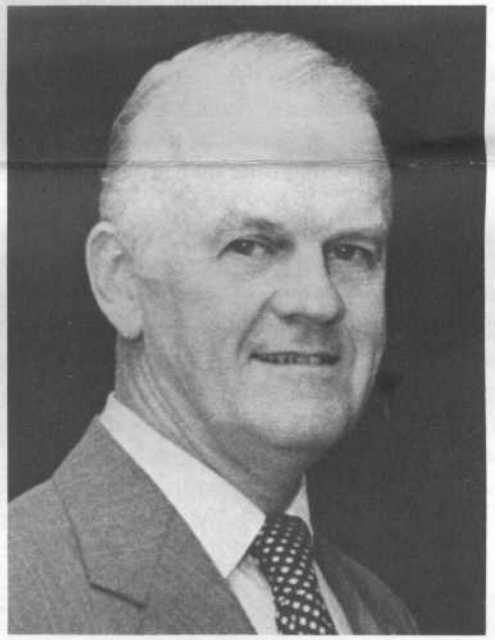

One should speak of coming to Hillsdale, not as a visit, but as a pilgrimage. The dictionary speaks of pilgrimage as "a journey to a sacred place or shrine," or as "any long journey or search, especially one of exalted purpose or moral significance." I come from Pennsylvania, which boasts of Valley Forge and Gettysburg. Hillsdale is no such scene of carnage or grandeur, but it stands out in my mind, gloriously, as the home and cause of a courageous company which has made an important counterstrike against 1984. Regardless of the ultimate outcome in the courts, Hillsdale's willingness to resist a grave imposition upon civil rights, grossly misplaced under the Civil Rights Act, is in itself a great victory for truth and has raised a standard to which anyone who loves liberty can turn his eyes and become strengthened. And that is what may count most of all in Hillsdale's resistance.

I come to you, not as one deserving to be included in the catalogue of distinguished scholars whose appearances have been sponsored by the Center for Constructive Alternatives, but simply as a litigator, someone out of the courts, whose particular fortune it has been to represent many people whose liberties have been threatened with destruction at the hands of government. But let me not cast myself as one of those champions of "unpopular causes" as these are popularized by the prestige media. Those who, under safe convoy of great organs of opinion

im•pri•mis (im-pri-mis) adv. In the first place. Middle English, from Latin in primis, among the first (things). . .

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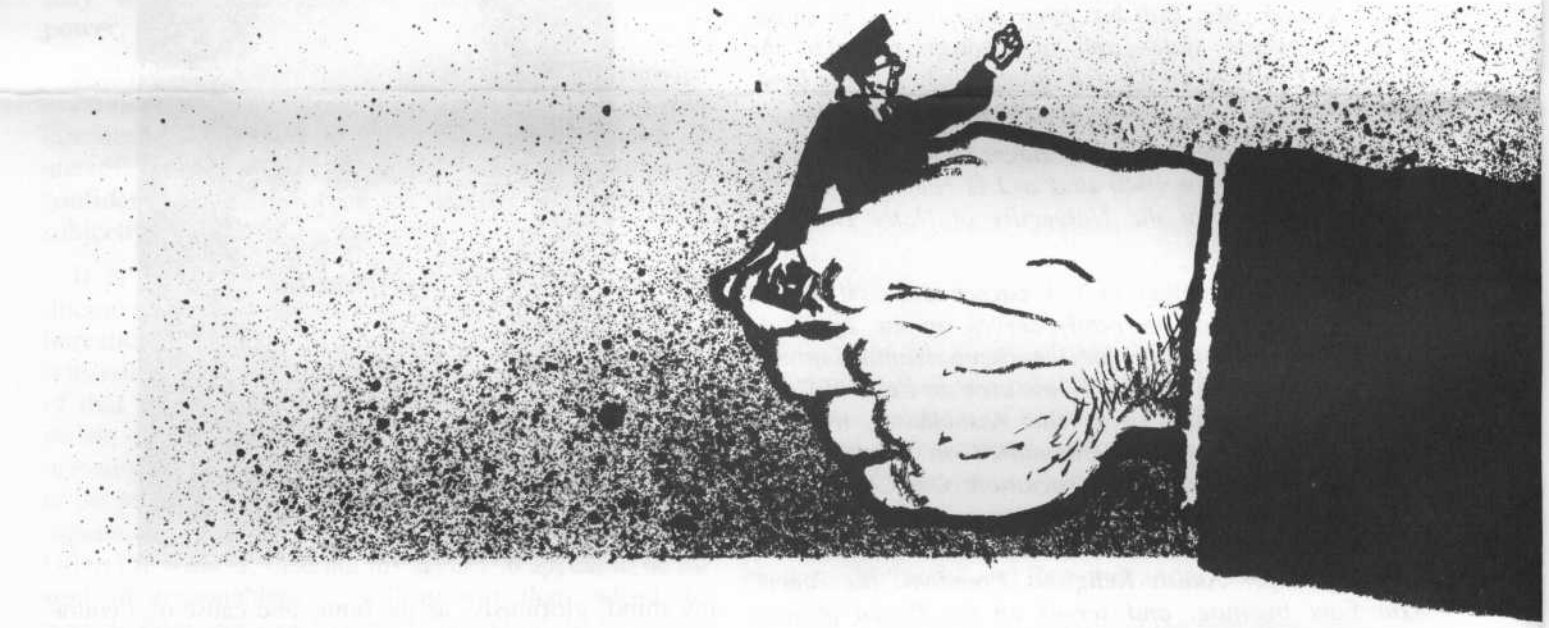
in our country, lead allegedly "daring" crusades against decency and order are sometimes represented as the noble and charismatic defenders of "unpopular causes." But there are causes—Hillsdale's is possibly one such—which we must reluctantly call "*un*popular unpopular causes." These so often receive no publicity or, if they do, the commentary is anxiously negative, with raised eyebrow, and heavily overbalanced by generous attention to the opposition's views. These unpopular unpopular causes are rarely portrayed as representing courage and as declarations for civil liberties, but at best as being "controversial."

I have named my topic tonight, "How to Be a Loyal Citizen When Government Is Subversive." That is meant to suggest to you that *government* may occasionally violate the Constitution, and that when it does, a citizen's loyalty may consist of resistance to government. Further it says "how to," thus suggesting that there are things which we can—maybe must—do in carrying out our duty to be loyal. So that you may see better what I am talking about, I thought I would take you into the courts where three cases are now going on and to three problems found in each, which can be given the labels, "arbitrativeness," "language" and "power." In each case, government is deliberately transgressing upon basic liberties, citizens are proving their loyalty to the Constitution by resisting government, and they are doing it by means which, while rightfully aggressive, are intelligent and lie within what Felix Frankfurter called "the traditions of civility"—a phrase he borrowed from Walter Lippmann, who attributed it to Coventry Patmore.

The locales of the three cases are remote one from another—Pawnee City, Nebraska, Corpus Christi, Texas, and Cape May, New Jersey—but you will note things that are common to all three situations. They all happen to relate to a single area of our liberties—religious liberty—but some aspects of these struggles for religious liberty have, I hope you will see, immense relevance to the protection of other liberties—such as economic freedom, the right of privacy, rights to know and to learn, and due process of law generally.

Let's start at Pawnee City. Near here dwell a handful of 16th century peasants known as the Old Order Amish. They have come to Nebraska for good farm land, but they have been elsewhere in a long and bitter history of the repeated attempts of the larger and more learned society to make them as dependent, aggressive and anxiety-ridden as everyone else. They have started an elementary

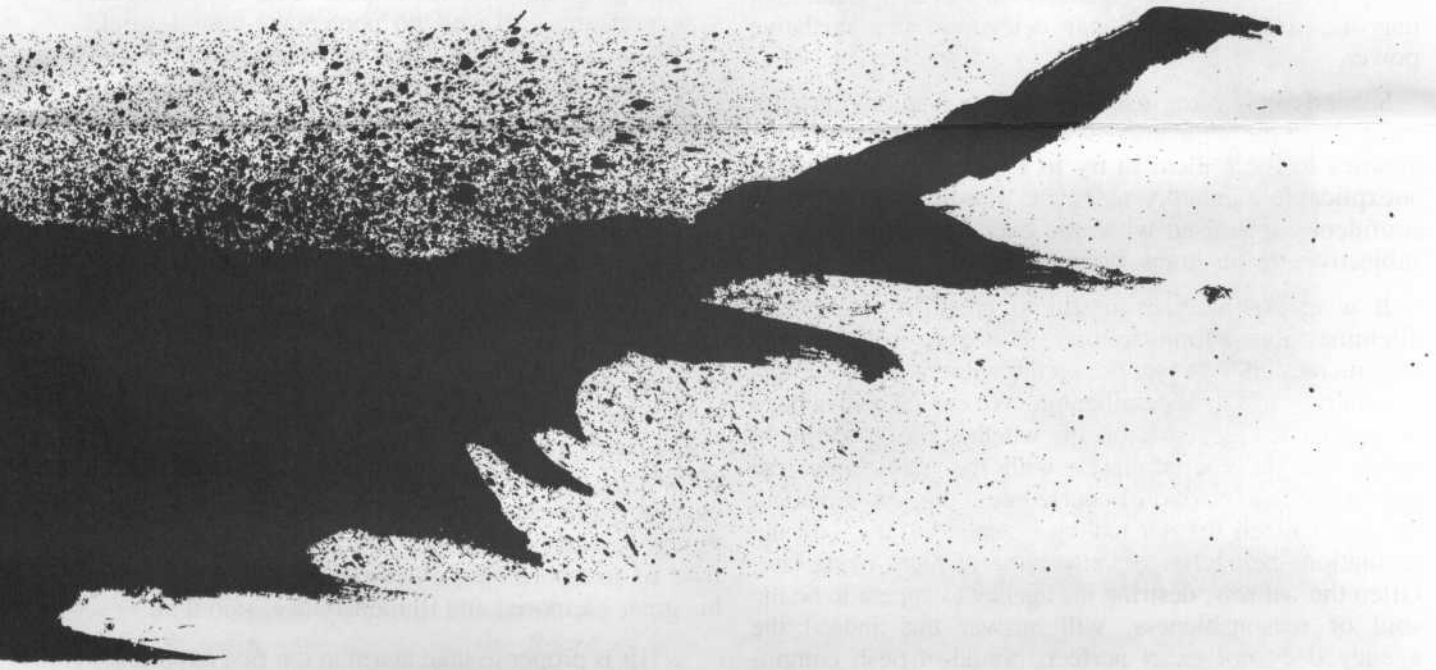


Amish school, with Amish teachers, for Amish children. For this, the State of Nebraska—no stranger to violent crime and white collar crime—has instituted criminal prosecution of Amish parents and criminal prosecution of Amish teachers. The nation can feel reassured to know that at least in Pawnee City, Nebraska, law and order are being maintained!

At Corpus Christi we encounter this phenomenon: extremely violent teenagers, many of whom are drug-addicted, and all of whom parents and society have concluded are virtually "terminal" cases, are being successfully regenerated. The scene is heart-warming—a comfortable country ranch which produces its own fruits, poultry, fish, vegetables, milk and bread. There is no junk food, no tranquilizing drugs, no television. There is indeed a quiet regimen—discipline, study, much outdoor life and, underlying it all, a spirit of love, hopefulness and courage fueled by one thing alone: the Bible. This is the remarkable project and achievement of Corpus Christi People's Baptist Church, led by its dynamic pastor, the now famous Brother Lester Roloff. Brother Roloff has been cruelly caricatured in the media, but this man, one

learns to know, is a highly rational individual, consumed with love of children, utterly dedicated to God, and the perfect example of a ''Don't Tread On Me'' early type American. His State of Texas is not pleased with Brother Roloff or with his Church's achievements for young people. The State—whose record of success in regenerating similar youngsters remains carefully undisclosed—nevertheless deems that it has a superior knowledge of these matters and that it alone has competence to prescribe what is best for such children. It, therefore, demands that the Church's homes must come under total State control.

The Church, which declines State gratuities, also declines State tutelage in so important a matter. In retaliation, the State last year went to court to have the Church homes shut down and the children dispersed to places where State methodology would have full sway. A splendid trial has been held in their case, about which more anon.



At Cape May stands Shelton College. It is not a Hillsdale but it has this in common with Hillsdale: a non-tax-supported college, it will *not* permit government to mold its policies. Unlike Hillsdale, Shelton is a pervasively religious college (different even from those hundreds of denominational colleges which are now essentially secular in character). Unlike Hillsdale, further, Shelton is the object of a governmental attempt to control the institution one hundred percent. The device is licensing. Under New Jersey statutes—incredibly—*all* institutions of higher education are denominated part of ''the *State system* of higher education''—whether private, whether religious, whether non-tax-supported. To enjoy that privilege, the institution must get a license; but if it does not want to enjoy that privilege, or if it is philosophically or religiously opposed to being governmentally licensed, then it is to be shut down. Shelton's board, students and parents do not desire Shelton to be a governmentally licensed agency. Educationally, they stick hard for its freedom to teach, to students' right to know. They flatly reject govermental prior restraint on the learning process.

The State, on the eve of Thanksgiving vacation, 1979, finding the College intransigent, secured an injunction from a State court judge shutting the College down. The College went at once to federal court and, on First Amendment grounds, got an injunction forbidding the State to control Shelton except in one particular. The federal court said that Shelton had a constitutional right to operate, to conduct a four-year program, to advertise itself as a college, and to recruit students. But the court left to the State court the determination of the question whether there is a supreme public interest in requiring that a college be licensed and totally state-controlled as the price of its being able to issue the baccalaureate degree. So back Shelton was forced to go to State court—indeed, to the very judge who had ordered it to stop existing. Here, too, trial has been held, and, in superb expert testimony upon the trial, Hillsdale's Distinguished Visiting Professor, Dr. Russell Kirk, brilliantly discoursed on myths and fallacies surrounding higher education, said what true education is, and quite thoroughly demolished New Jersey pretensions. The State court judge, however, has now held that Sheldon is barred from issuing degrees. As one student put it: ''The courts say we can stand at bat, hit the ball, and run three bases—but we can never get home.'' This case is on appeal.

There you have three examples wherein citizens are being loyal—standing up, indeed suffering for, everybody's constitutional liberties, while it is government which is ruthlessly at work subverting the Constitution.

One could cite many more. Because we are drowning in government, we are drowning in law, and all too much law is disturbingly arbitrary. Take a look, for example, at a recent state health department regulation governing private hospitals. It says that medication shall be administered only on "the signed orders of a physician." That is to say, a nurse may not be told by a doctor to give a patient a pill; he has to put that in writing. Preposterous. This is elevated from the preposterous to the humorous by the fact that, a little later on, this same set of regulations says: "Telephone orders for medication are permitted." So either the hurried doctor hands the nurse a written instruction or he says to her: "You get on this phone, and I'll get on that phone, and then I'll tell you you can give Mrs. Jones that pill."

But now let me speak of some matters which are common to these three cases. And in these common matters we will find keys of resistance to governmental subversions, or the "how to" of "How to Be a Loyal Citizen When Government Is Subversive."

Of course there must be at the outset some sort of love of liberty upon the part of those who are imposed upon, as well as capacity to perceive imposition. This love and the perceptions which often go with it become deadened in socialist societies, and people there appear grateful for mere existence. Many in the United States, however, are beginning to find irrelevant or disturbing the spirit and perceptions of a Madison or a Jefferson or a Paine or a Franklin. Americans today are picking up a touch of the East German citizen's mentality which looks askance at the "troublemaker" who questions whatever may be called "public policy."

One thing common to all the three cases relates closely indeed to perception. It is the matter of *language*. Law consists of words, and there is a right, in every citizen, to know what those words command him to do or forbid him from doing. All too often today the law-abiding citizen cannot find out. That is due to the fact that the regulatory language is unintelligible. For example, Nebraska's regulations, now sought to be imposed on a one-room Amish elementary school, state:

> Each professional staff member employed by the elementary school shall hold a valid Nebraska certificate or permit issued by the State Board of Education *legalizing* him or her to teach the grades or subjects to which elected.

Apart from the question of the obviously severe educational deficiency of the State Board of Education which conceived that a person could be "legalized" to do something, we have the graver problem that this language calls for a person to teach grades or subjects "to which elected." I have not yet found out how one becomes one of the elect. I don't find anything in Nebraska law which provides for being "elected" to teach a particular grade or subject. And if (somehow) you are elected to teach particular grades, then need you also be elected to teach particular subjects? The wording is "legalizing him or her to teach the grades *or* subjects to which elected."

Nebraska's educationists are indeed not the sole purveyors of incomprehensible law. Here is Standard IV of the Standards For Accrediting Kentucky Schools promulgated by the Kentucky State Board of Education:

> Major safeguards for quality education are a well-designed master schedule, effective administrative routines, adequate undisturbed class time, and *profusion for a high degree of self-direction on the part of students*.

As well you can see, illiteracy is by no means confined to disadvantaged black children in metropolitan schools. It is, in actual fact, widespread among governmental regulators—indeed, including legislators. That amounts, however, to far more than the kind of misfortune to which William Safire so frequently draws our attention (namely, mere clumsiness with one's own language). When clumsy expression takes the form of *law*—which one must obey or not obey—and where either one can result in loss of fundamental rights, or even harm one's business, livelihood, or comfort, or privacy, then the clumsiness becomes dangerous.

The Supreme Court, in the *Keyishian* case,* (a First Amendment case) well stated:

> ..."[p]recision of regulation must be the touchstone in an area so closely touching our most previous freedoms"...; [f]or standards of permissible statutory vagueness are strict in the area of free expression.... Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

Looking at a particular set of regulations, the Court further said:

> The regulatory maze created...is wholly lacking in "terms susceptible of objective measurements... [M]en of common intelligence must necessarily guess at its meaning and differ as to its application...." *Ibid.*

And, as we note that most Americans feel a duty to obey just laws, we also note the Court's further comment as it said:

> "...[t]he very intricacy of the plan and the uncertainty as to the scope of its prescriptions make it a highly efficient in terrorem mechanism"—especially to "those with a conscientious and scrupulous regard for such undertakings." *Keyishian, supra,* at 601, 599.

In the Corpus Christi case, the Texas Department of Human Resources—one of the most swollen bureaucracies in the history of mankind—felt, and gave way to, the urge to promulgate a vast Code of Minutiae otherwise known as Regulations For Institutions Providing Basic

* *Keyishian v. Board of Regents*, 384 U.S. 589 (1967).

Child Care. The all-inundating State wisdom embraces a prescription for the food which such institutions may serve. One most interesting provision is found in Appendix IV which regulates dietary allowances. At page 36, we find the Milk Group, and there it is stated that the institution must choose specific amounts—for example, "one *thin* slice of cheddar cheese" must be included. But to that is appended a footnote: "If cheese is counted as milk, it should not be counted as meat." Because my client's homes were about to be put out of existence for refusal to go along with these State regulations, I felt it would be well that I, the client, the State—and the judge—all had a common and clear understanding of what that regulatory language meant. On the witness stand, the State Chief of Licensing was forced to agree that all the words just quoted were mandatory. And though my client was obligated to obey these provisions, and thus to understand them, the Chief of Licensing was utterly unable to.

Here, then, we see one of our "How To's": we must be loyal by attacking irresponsibility in regulatory language. The lawmaker or regulator is sworn to observe the Constitution, and loose language usually raises serious due process problems. The lawmaker or regulator is paid to draft responsibly. We must keep the shoe of responsibility on his foot. At the first sign of an imposition couched in language indistinct, the person (individual or institution) imposed upon should at the outset make known that fact and demand that no further steps be taken. Pointing out fatal flaws in regulatory language may deter an intelligent and conscientious regulator from attempting to pursue the matter. Alas, I have found this almost never true. They characteristically prefer to sail their rudderless ships straight onto the rocks of litigation—but the effort always ought be made. If litigation must ensue, it is better, for the record, that *your* attempt to obviate it be shown.

I said we would be speaking tonight of things arbitrary, of language problems, and of power. To turn now to the last mentioned: power. Liberty-conscious citizens sometimes spot arbitrariness in a particular law of regulation; they rarely probe matters of language, and they almost *never* ask whether a particular statute or regulation purports to give plenary power over them (or their enterprises) to a governmental body. Let me try to put this into focus.

If you would make out a check, hand it to someone, and leave the amount blank, would you be comfortable? You would rarely do this even with a friend because you would be leaving it in that person's *power* to withdraw your entire bank account. Trust the person though you may, you will prefer not to leave the matter to trust: the *power* to impoverish you is too dangerous a power to place in almost anyone.

Now governmental laws, with alarming frequency, give blank checks to governmental agencies—regulatory bodies, boards, commissioners, etc. And all too frequently these blank checks go absolutely unobserved or, if observed, are greeted with a thing alien to—dangerous to—a government of laws—namely, trust in men, in public servants. Take, for example, the regulations governing private higher education in New Jersey. Their real impact came to light in the *Shelton* case where the whole unconstitutional licensing scheme was being resisted. This was a set of regulations, indeed neutral, or even constructive, in appearance. It covered every aspect of an institution's existence but each of the multitude of standards contained, as its key term upon which pass or fail depended, a benign word such as "reasonable" or "adequate" or "effective" or "satisfactory" or "appropriate." For example, §9:1-1.2: "Each institution shall maintain an appropriate operationally effective statement of purpose." All of this sort of statement, on its face, appears completely reasonable. But not readily observable was one sentence in these regulations which reads as follows: "The application of the terms, 'reasonable,' 'adequate,' 'effective,' 'satisfactory,' or 'appropriate,' as used in these regulations, shall be solely as determined by the State Board of Education." That sentence confers upon the State *total* power over every institution of higher education in New Jersey. Those words of indefinite breadth give accordion-like powers to administrators, who may, according to their personal and subjective judgments, expand or contract their meanings at will. Those words import a government, not of laws, but of men: the singular object of all that the Founding Fathers sought to resist in the writing of the Constitution.

What was the attitude of other New Jersey colleges similarly faced with total state control? For those which understood that to be so (and that was indeed not all), it was, first of all, that the college had a primary duty of survival; that they chose not to make waves—certainly not to become involved in litigation; finally, that the State had been understanding and cooperative.

What was the attitude of the New Jersey State Board of Higher Education when faced with Shelton's complaint that a private, non-tax-supported, religious college should not be subjected to state control? It was, above all, one of empathic agreement with those complying colleges, that the State had indeed been understanding and cooperative.

I would like to focus you most carefully on this critical point of total governmental power over private entities which are not governmentally supported, where that governmental power is only partially exercised and is in fact benignly exercised. It is full of mischief. It makes for corrupt bargains. The private institution becomes a suitor for the personal good will of the governmental administrators. After that sacrifice of principle, it is willing, often, to set aside its own judgments on matters wherein its knowledge and experience are far superior to that of the governmental body. Government, too, is corrupted by the transfer of standardless power into the hands of administrators who then, able to loose or to bind, to grant or

to deny, to penalize or to encourage, become managers of the private enterprises with all the dangers to the health of the nation which that brings with it.

In the face of this growingly commonplace subversion of private sector rights, by government, how shall the citizen be loyal? There are three ways:

First, unflinching resistance, once careful analysis has disclosed broad grants of power such as I have described. If the regulations are drawn so that the agency will be exercising broader powers than the legislature provided, attack the regulations as *ultra vires*. If a statute confers sweeping powers to an agency, with no clear standards to limit and bind the agency, then the agency is actually being given power to legislate—make laws—and that may be an unconstitutional delegation of legislative power.

Second, it is often useful to test regulations through questioning the regulators. It can be very helpful to your liberties to force them to try to explain the meaning of unexplicable regulatory language. Power may not be so confidently exercised when the exercise is shown to be subjective, up-for-grabs, homemade law.

It is also sometimes useful to create the following dilemma for administrators. However ruthless the bureaucracy may in fact be, on the witness stand in court it usually wants to appear benign. We can take advantage of that by asking, first of all, whether the government insists on 100% compliance with the regulations, the reason you are in court of course being that you are about to be penalized for *not* having complied 100%—all the regulations being law, or else none of them being law. Often the witness, desiring his agency to appear to be the soul of reasonableness, will answer that indeed the agency does *not* exact perfect, pound-of-flesh compliance. Indeed not. It is quite willing to go along with "reasonable" compliance where a "good faith" effort is shown. But that, of course, means that not *all* the regulations need be fully complied with. But if that is so, then greatly undercut is the government's assertion in its enforcement proceedings, that the supreme public necessity underlies the regulations. This can lead to the further fascinating question of what *percent* of the regulations must be complied with in order to "pass." The following is a colloquy from the case of *Rudasill v. Kentucky State Board of Education,* in which a furious bureaucracy had prosecuted a private organization for failure to comply with a mass of regulations.

> "Q. ...if I asked you how many failures result in denial of approval, what would your answer be?
>
> A. Are you speaking of percentage-wise?
>
> Q. I'll ask you—Yes. Let's take it in terms of percentage.
>
> A. I would have to know, basically, what you're talking about, to which area. You've mentioned several areas. If you go percentage-wise I would explain to the Court what the mandated programs are. We feel like those would have to be brought into compliance. But other things I would say somewhere in the thirty or forty percentile.
>
> Q. I'm talking only about the shalls.
>
> A. Well, I'd say thirty or forty percent.
>
> Q. Thirty or forty percent? Now, how do you come by that answer?
>
> A. Well, that's just off the top of my head."

Third and finally, we need to drive deeper into the consciousness of the private sector, of the public generally, and, indeed, of attorneys, the evil inherent in uncontrolled governmental power and how we debase the currency of everyone's liberties when we cooperate with governmental lawlessness by yielding on principle in the face of irresponsible governmental action. Madison, in his great Memorial and Remonstrance, said it all:

> ...[I]t is proper to take alarm at the first experiment with our liberties.... The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedent. They saw all the consequences in the *principle*, and they avoided the consequences by denying the principle.